United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,198

William Gass, Appellant

vs

United States of America, Appellee

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Did not the Court below err in allowing government's Exhibits 7a and 7b to be admitted into evidence over the objection of trial counsel?

2. Did not the Court below abuse its discretion in allowing Appellant to be impeached on the basis of a prior conviction?

3. Was not Appellant unfairly prejudiced by the prosecutor's closing argument?

4. Was not the judgment contrary to the weight of the evidence, i.e. should not the Court below have granted Appellant's motion for acquittal at the close of the Appellant's case.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered by the United States District Court for the District of Columbia (Matthews, J.) in Criminal Case No. 475-66 on June 30, 1967. The District Court granted Appellant's application to appeal to this Court without prepayment of costs. This Court has jurisdiction to entertain this appeal pursuant to the provisions of 28 U.S.Code, Section 1291.

STATEMENT OF THE CASE

On April 18, 1966, Appellant, William Gass, was indicted on a three (3) count indictment charging him with one (1) count of rape and two (2) counts of robbery. The indictment arose as a result of the rape and robbery of Betty J. Beynum and the robbery of Emma L. Perry, which occurred on February 3, 1966, in premises 717 "F" Street, N.E., Washington, D. C.,

at approximately 7:00 p.m. The following testimony, evidence and facts are a matter of record in this case:

Betty J. Beynum testified that on Thursday, February 3, 1966, she was working at the Temple Cleaners, 717 "F" Street, N.E., at approximately 6:55 p.m. when a man with a gun entered, robber her and her fellow worker, Emma L. Perry, raped her and then fled the scene (T.Tr. 13, 14, 16, 19, 20). She further testified as to the relatively poor lighting conditions in the premises (T.Tr. 35, 42, 43, 48, 49, 50, 51, 52, 53, 55).

Emma L. Perry testified to essentially the same facts (T.Tr. 109, 111, 112, 118).

During the trial both complainants identified Appellant as the perpetrator of the aforesaid offenses (T.Tr. 14, 110). Additionally, Mrs. Beynum testified that she saw the Appellant at police headquarters a week after the incident during the course of a line-up procedure. She stated that when she first saw the Appellant he was seated at a table and the only other persons present were her husband and police. Subsequently she saw him in a line-up (T.Tr. 69, 70, 73). Mrs. Perry also testified that she identified the Appellant at the line-up (T.Tr. 165), but the police officer who conducted the line-up testified that Mrs. Perry only made a tentative identification (T.Tr. 172, 174). Both Mrs. Beynum and Mrs. Perry testified that the Appellant was heavier and larger at the time of the incident then at the time of the trial (T.Tr. 68, 168).

Dr. Marelene Kelly testified that she examined Mrs. Beynum at approximately 9:30 p.m., February 3, 1966, and that she found no external evidence of any trauma and that she could not make a determination that

Mrs. Beynum had recently had any sexual relations on the basis of the physical examination. Dr. Kelly further testified that she took smears from the vaginal vault and from the cervix and that the smears were placed on slides, sent to the laboratory and that a sperm test was made as a result of which Dr. Kelly found intact sperm (T.Tr. 83, 84, 85, 89, 90).

Dr. Benjamin Turla testified that he examined the aforesaid slides at about 9:30 a.m., on February 4, 1966, and that as a result of said examination he found intact sperms (T.Tr. 96). Dr. Turla also testified as to the procedure for the examination of smears (T.Tr. 98). The two (2) slides were introduced into evidence over objection of trial counsel (T.Tr. 99).

Appellant relied primarily on an alibi defense buttressed by inconsistencies in the government's case. Three (3) defense witnesses, Christine Duncan, Irene Houser and Michael Mason, testified that Appellant could not have been present at the scene of the crime at the critical time because he was, in fact, elsewhere. Christine Duncan testified that Appellant was constantly with her from about 6:00 p.m. on the evening of February 3, 1966, until they retired sometime after 11:00 p.m. She testified that he came to the apartment at approximately 6:00 p.m., they subsequently had dinner and then went to the movies at about 7:00 p.m.; that they stayed at the movies until the end and then returned to the apartment at approximately 11:00 p.m. (T.Tr. 188, 189, 190, 191). She was able to pin-point the exact date by its relation to her grandmother's birthday, February 2, 1966, and by the fact that this was the first time that she and Appellant had gone out in the evening since moving to the apartment (T.Tr. 193, 194).

The testimony of Irene Houser (T.Tr. 199, 201, 202, 203) corroborated that of Christine Duncan. Additionally, Michael Mason testified that he saw the Appellant at the movies on February 3, 1966, at about 7:35 p.m. and that he remembered the date because of the snow storm and of a dance contest that was cancelled (T.Tr. 204, 205, 207, 208, 210).

Following Michael Mason's testimony, trial counsel approached the bench and requested the Court to make a Luck determination with regard to Appellant's prior convictions. The Court was presented with the fact that Appellant had been indicted in October, 1953, on two (2) charges of robbery for which he was sentenced to from three (3) to ten (10) years and three (3) to nine (9) years, consecutively, making the total sentence six (6) to nineteen (19) years, and that Appellant was paroled on November 13, 1964. The prosecuting attorney cited the "Brooke" case for the proposition that it would be perfectly reasonable to bring out the prior conviction. The Court thereupon ruled that one (1) of the convictions would be allowed for impeachment purposes (T.Tr. 211, 212, 213, 214).

Appellant thereupon took the stand in his own behalf and testified that he went home on the date in question at approximately 6:00 p.m. as he and Christine Duncan were planning to go to the movies and that about 7:00 p.m. they went to the movies where he saw Michael Mason (T.Tr. 216, 217). Appellant further testified that he had lost no weight since February 3, 1966; that he did not go to the Temple Cleaners on February 3, 1966, and that he had never seen Mrs. Beynum or Mrs. Perry until the line-up (T.Tr. 219). On cross-examination the Appellant testified that he owned a light blue jacket, but did not own a darker one. He also testified that on the evening in

question he saw about eight (8) other people, none of whom were at the trial to testify in his behalf and his credibility was attacked on the basis of the prior conviction of robbery (T.Tr. 224, 225, 226, 227). On re-direct examination, Appellant testified that he did not own the red sole arctic boots which had been described by the complainants, that in fact, the only boots he owned were all green (T.Tr. 227). Following Appellant's testimony the defense rested and moved for a directed verdict of acquittal which was denied by the Court (T.Tr. 228).

During closing argument the prosecuting attorney made the following statements to the Jury:

> "We know that on the evening in question shortly before 7:00, when Mrs. Perry and Mrs. Beynum were just about ready to close the cleaners, the defendant came in and pulled a gun or had a gun in his hand and told Mrs. Beynum that this was a holdup and he demanded money and that Mrs. Beynum showed him the empty cash register and said they didn't have any money."
> (T.Tr. 233)

> "We have, also, the fact, that there were several other line-ups, according to Detective Wolfgang, which yielded negative results." (T.Tr. 237)

> ". . . it is perfectly reasonable to have snow on the ground in February.
>
> It is also reasonable to expect snow to be on the ground in January or December or even March; but just the fact that there was a snow storm, doesn't mean it was February the 3rd.
>
> Mr. Mason also tells us that he remembers there was some sort of contest. That it was a dancing contest scheduled for the following day, which he says was Friday, February the 4th, but we know nothing more about that contest than just what he has told us. He said it was somewhere in Maryland, but we don't know where in Maryland and we've had no testimony, no proof, with respect to that contest as to whether it was in fact scheduled to start or take place on February the

4th or on February the 11th or February the 18th or some other time, even in January." (T.Tr. 240, 241)

"Another factor that you may consider, and which Her Honor will instruct you on also, is the prior criminal record of the defendant.

Now, you will recall the defendant took the stand and testified, during cross-examination, when he was asked if he was the same William Gass who was convicted of a robbery in a certain case, that he stated that he was.

Ladies and gentlemen, it is important to remember the purposes for which this testimony comes to you. The reason that you are told about a prior conviction of any crime by any witness, is so that you may know what kind of a person he is in order to weigh his testimony and evaluate that testimony.

Just because he may have been convicted of robbery before does not mean, or doesn't necessarily mean, that he is in fact guilty of the robbery in this case. The purpose of that evidence is simply for you to consider it as a factor in determining the witness' credibility and Her Honor will instruct you fully on this matter; but this is something that you should bear in mind and probably something that many of you know from having sat as jurors previously." (T.Tr. 243-244)

"Ladies and gentlemen, if that is the case, where are those people today? Why aren't they here to back up the defendant's story?

I submit to you that the only reasonable inference you can draw from their absence, the absence of all eight (8) of these people, is that they would not support the story of the defendant, that they would not support his tale about having gone to a movie on that night."
(T.Tr. 245)

STATEMENT OF POINTS

1. The Court erred in allowing government's Exhibits 7a and 7b to be admitted into evidence.

2. The Court abused its discretion in permitting Appellant to be impeached by a prior conviction.

3. The Appellant was unfairly prejudiced by the prosecutor's closing argument.

4. The finding of guilty was contrary to the weight of the evidence.

SUMMARY OF THE ARGUMENT

I.

Trial counsel properly objected to the introduction into evidence of government's Exhibits 7a and 7b, the smear slides taken at D.C. General Hospital, and it is Appellant's position that the admission of such evidence over the objection of counsel was prejudicial error. Trial counsel's objection was based upon the failure of the government to show custody and control of said slides from the time the smears were taken until they were examined by the pathologist. Even accepting arguendo the premise that such evidence might be admissible under the Federal shopbook rule, that rule is not applicable in the instant case because of the failure of the government to prove that the slides and the records pertaining thereto were kept in a normal course of business.

II.

This case presents an ideal vehicle for the application of the "Luck" doctrine. Such was recognized by trial counsel and a timely motion

for the invocation of the Court's discretion was made. The Court, however, faced with two (2) contemporaneous remote convictions of robbery made a "Solomon's" decision keeping one out and allowing impeachment with the other. The sole basis in the record for the Court's decision is that one conviction bore the No. 1708-53 and the other 1709-53 and impeachment was allowed on the basis of 1709-53 being "the last one".

It is readily apparent that in the instant case, wherein for all practical purposes the sole question to be decided by the jury was whether to believe the identification made by the complainants or to believe the alibi testimony of Appellant and his witnesses, the allowance of impeachment on the basis of a remote conviction was unduly prejudical to Appellant and far-out weighed the minimal probative value of the conviction.

III.

The prosecuting attorney unfairly and unduly prejudiced Appellant by his closing argument. As was stated above the evidence in this case presented a delicate balance and it was for the jury to weigh whether or not the government's evidence sufficiently overcame Appellant's evidence and proved Appellant to be guilty as charged beyond a reasonable doubt. The prosecuting attorney in affect stated that he knew the Appellant committed the crimes charged. Furthermore, the prosecuting attorney attempted (and Appellant believes that such attempt was successful) to testify in the closing argument in rebuttal of the testimony given by Appellant's witnesses. The prosecuting attorney unduly and at great length stressed Appellant's prior conviction and, rather than moving the Court for an absent witness instruction, argued to the jury the inferences to be drawn from the absence of certain witnesses.

IV.

The judgment below was contrary to the weight of the evidence and the Court should have granted the motion for judgment of acquittal at the close of the defendant's case. It is admitted that the complaining witnesses identified Appellant as the perpetrator of the crimes and that, ordinarily, this would be enough to establish a jury question. It is submitted, however, that the nature of the identifications and the circumstances under which they were made subtracted a great deal from the probative value of the identifications. When considered in light of the entire record in this case, including, but not limited to, the inconsistencies in the government's case, the tenuous quality of the physical evidence, the physical examination of complainant Beynum and the strong alibi defense, such identifications were not sufficient. The inherent weakness of the government's case is best exemplified by the efforts of the prosecuting attorney to offer rebuttal testimony during closing argument. The record disclosed too great a probability of innocence to allow the case to go to the jury.

ARGUMENT

I.

THE COURT ERRED IN ALLOWING GOVERNMENT'S EXHIBITS 7A and 7B TO BE ADMITTED.

During the course of the trial, Dr. Kelly testified that she examined Mrs. Beynum and took smears from the vaginal vault and from the cervix and that the smears were placed on slides and sent to the laboratory (T.Tr. 85). She further testified that at a later time, subsequently to the laboratory procedures, she examined the slides and found intact sperm (T.Tr. 85, 89, 90). There was no testimony on her part as to when she examined the slides, where

she examined the slides. Furthermore, Dr. Kelly did testify that she didn't know what happened to the slides while they were out of her presence (T.Tr. 91).

Dr. Turla testified that he examined the slides approximately twelve (12) hours after Dr. Kelly took the smears and he found intact sperm (T.Tr. 96). Trial counsel properly objected to the admission of the slides into evidence, but such objection was overruled. The basis of the objection was that the government failed to establish the necessary links in the chain of identification and that the testimony disclosed a lapse of custody or control from the time Dr. Kelly sent the slides to the laboratory until Dr. Turla examined them.

Even after the government was on notice that the evidence was being challenged, the missing link was not supplied. The Court asked Dr. Turla if there was an established procedure for the examination of specimens and received the following response:

> "The specimen is received, as soon as the specimen is received in the laboratory the specimen itself is checked for identification on the patient, the names of the doctors and we enter that in our books. Now, after that, the smears, after that they are stained properly and after that it is examined by the pathologist for sperms." (T.Tr. 98)

This answer did not fill in the missing link. Accordingly, the slides should not have been admitted into evidence, nor should the testimony of Dr. Kelly and Dr. Turla concerning the results of the examination of the smears been admitted. See Novak v. District of Columbia, 82 App. D.C. 95. The rule enunciated in Novak has not been vitiated, for the purposes of the instant appeal, by Wheeler v. United States, 93 App. D.C. 159 which makes the Federal Business Records Act, 28 U.S.C. Section 1732 (a), applicable to evidence of

the type herein in question. In Wheeler, at page 164, the Court distinguished Novak as follows:

> "* * * the specimen there was not taken in the regular course of business of the laboratory involved."

The Court in Wheeler found that:

> "There is no doubt that these slides were made and kept in the regular course of business and that it was the hospital's regular course of business to make them." (p. 163)

and that the

> "* * * testimony demonstrates that the procedures followed in this case were those regularly used by the hospital to make and keep a record of this kind."

Not even the direct question by the Court (supra) could elicit more than that the names of the patient and doctors are checked for identification and entered in the books. Additionally, the prosecuting attorney only asked whether the marks on the slides are placed "in the ordinary course of hospital business" (T.Tr. 98). Appellant submits that such testimony is not enough and the evidence should not have been admitted.

The admission of the evidence of intact sperm was not harmless error. The doctor had testified that the physical examination revealed nothing. Without this evidence, there would only be the uncorroborated testimony of the complainant that she had been raped. The corroborating evidence of the smears may very well have tipped the balance against the Appellant.

II.

THE COURT ABUSED ITS DISCRETION IN PERMITTING APPELLANT TO BE IMPEACHED BY A PRIOR CONVICTION.

Prior to putting Appellant on the stand, prior, in fact, to determining whether or not Appellant would take the stand, trial counsel requested

the Court to make a Luck determination. Luck v. United States, 121 App. D.C. 151. The prosecuting attorney advised the Court that Appellant was convicted in two (2) robbery cases in 1953 and that he had received sentences of three (3) to ten (10) years and three (3) to nine (9) years, to run consecutively. Trial counsel requested the Court to keep the record of prior convictions out. The prosecuting attorney cited Brooke v. United States, No. 20,241, April 19, 1967, as authority for allowing the prior convictions. The Court allowed only one of the convictions, picking the one with the higher number, 1709-53, rather than 1708-53. (T.Tr. 211, 212, 213, 214). The prosecutor's reliance on Brooke was misplaced as that case is clearly distinguishable.

In the instant case, the record shows that Appellant was thirty (30) years old in 1966 (T.Tr. 173) and that the prior convictions were in 1953, some thirteen (13) years earlier. In Brooke, the record consisted of six (6) prior narcotic's convictions. Appellant's prior record should have been excluded entirely because of remoteness and because Appellant was on trial for the same offense as the prior conviction. See Gordon v. United States, No. 20, 126, September 18, 1967.

The effect upon the jury of Appellant's prior conviction of robbery cannot be over stated. This is especially so due to the manner in which the prosecutor stressed this fact during closing argument (T.Tr. 243, 244).

See also Covington v. United States, 125 App. D.C. 225, wherein it is implied that, even absent timely objection to the introduction of prior conviction, this Court might consider such introduction to be plain error if the government's case were not as strong as in that case. It cannot be said that the record herein discloses

"* * * so strong a case that it is unlikely the Appellant could have suffered prejudice in any event." Covington, supra.

III.

THE APPELLANT WAS UNFAIRLY PREJUDICED BY THE PROSECUTOR'S CLOSING ARGUMENT.

At the close of Appellant's case, the jury was faced with a simple question: should they believe the identification made by the complaining witnesses or should they believe Appellant and his alibi witnesses. There was some question concerning the identification originally made by Mrs. Perry and some doubt had been cast on the lighting conditions at the scene of the crime, which, when considered in light of the naturally upset emotional state of the complainants, raised further questions as to the identification. Such was especially so because the Appellant had presented a strong alibi defense.

But the jury was not permitted to deliberate solely on the basis of the evidence that they had heard and seen. The prosecuting attorney told them that he knew the Appellant had entered the premises with a gun (T.Tr. 233). He mischaracterized the testimony of the police officer and unduly stressed said mischaracterization (T.Tr. 237). He unduly stressed the prior criminal record of Appellant (T.Tr. 243, 244). He did not request an absent witness instruction, but he did tell the jury the only inference that they could draw from the absence at the trial of the people Appellant testified he had seen during the time in question (T.Tr. 245).

Taken as a whole, the prosecutor's argument to the jury went beyond the bounds of fair advocacy and the Appellant was unduly prejudiced. See Berger v. United States, 2950 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, and Reichert v. United States, 123 App. D.C. 294.

IV.

THE FINDING OF GUILTY WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

Appellant contends that the jury's verdict in the Court below was not supported by the evidence and that the Court should have granted the motion for judgment of acquittal after the defense rested. It is admitted that the government may have established a prima facie case, but such was diluted by the Appellant's evidence to the extent that it was no longer sufficient to prove Appellant guilty beyond a reasonable doubt.

Serious doubts were raised during the examination and cross-examination of the government's witnesses with regard to the identification of Appellant. Such doubts, standing alone, may not have been sufficient to entitle Appellant to a judgment in his favor at the close of the government's case, but the addition of the clear and convincing alibi testimony certainly so entitled Appellant thereafter.

CONCLUSION

Appellant respectfully requests that the judgment of conviction on all counts of the indictment of the United States District Court for the District of Columbia be reversed inasmuch as said convictions were the product of evidence erroneously introduced into evidence, misapplication of the Luck doctrine and improper and prejudical remarks by the prosecutor. Furthermore, the judgments were contrary to the weight of the evidence.

In the alternative, Appellant respectfully requests that the judgments be reversed and that this case be remanded to the District Court for a new trial.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,198

WILLIAM J. GASS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALBERT W. OVERBY, JR.,
Assistant United States Attorneys.

Cr. No. 475-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Whether the trial court erred in admitting into evidence two slides of specimens taken from a rape victim, where appellant objected to admission on a chain-of-custody basis, and if so was not the error harmless?

2) Did the trial court abuse its discretion in allowing impeachment of appellant by one of two 1953 robbery convictions for which he was incarcerated until November 1964, when appellant had already produced three witnesses whose testimony supported his alibi defense?

3) Need this Court consider appellant's contention that the prosecutor erred in his closing argument? And assuming that the Court considers the issue, was there error, and if so did it substantially prejudice appellant?

4) Should this Court overturn the trial judge's denial of appellant's motion for judgment of acquittal?

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OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,198

WILLIAM J. GASS, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a three-count indictment filed April 18, 1966, appellant was alleged to have raped Betty J. Beynum (22 D.C. Code § 2801) and robbed her and Emma L. Perry (22 D.C. Code § 2901), which acts were said to have occurred on February 3, 1966. On April 29, 1966 appellant pled not guilty to these charges. On June 24, 1966 appellant moved for a mental examination, which motion was granted on June 29, 1966. By letter of August 21, 1966 Dr. Dale Cameron, Superintendent of Saint Elizabeths Hospital, informed the court that it was the opinion of the psychiatrists examining appellant that he was without

mental disease or defect, competent to stand trial, and that the offenses charged were not related to, caused by, or the product of a mental disease or defect. By order of September 12, 1966, entered without appellant's objection, appellant was found competent to stand trial.

Trial before Judge Matthews began on June 7, 1967. On June 9, the jury found appellant guilty as charged. On June 30, 1967 he was sentenced to serve four to twelve years on the rape charge and two to six years on each of the robbery counts, said sentences to run concurrently.

This appeal followed.

I. The Government's Case

A. *The Testimony of Mrs. Beynum*

The testimony of Mrs. Bynum established that on February 3, 1966, about five minutes before the cleaners in which she worked was to close (about 6:55 p.m.), a man walked in and said something that she did not understand. When she looked up, she saw that he had a gun in his hand. He told her to "hand over the money" (Tr. 12-14). He reiterated this demand when she said that she didn't have any money, so she "showed him the cash register drawer that was half open and told him there wasn't any money in there" (Tr. 14). She then called Mrs. Perry, the manager of the cleaners, who was in the back room. She came up to the front and said that they didn't have any money (Tr. 15-16, 50, 55). He came behind the counter and told them both to go into the back room and followed them there (Tr. 16, 55).[1] The man snatched the phone out of the wall and told Mrs. Perry to get the money (Tr. 16, 57). Mrs. Perry then took the day's receipts from a pair of pants hanging nearby and gave it to him (Tr. 16, 57-58).[2] He then told them to empty their

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[1] The witness could not say how long the three of them were at the counter before going into the back. She did not look back as he followed them (Tr. 55-56).

[2] Before he took the money, he had Mrs. Perry lock the front door (Tr. 73).

purses. Each handed him a dollar from their respective purses, which had been placed on a nearby table (Tr. 16, 58). He told them to turn around and then tied Mrs. Perry's hands behind her back with cord he took out of his pocket (Tr. 16-17, 58-59, 62).[3] He complied with Mrs. Beynum's request not to tie her because of an injury to her arm (Tr. 17, 63). The man told her to sit down in a "large sofa chair" in the back room, after having put Mrs. Perry in the bathroom (Tr. 17-18, 62). The witness continued:

> . . . I asked him not to hurt me because I had five kids and in the meantime he knelt in front of me and I told him that I think a period was coming up and he ran his hand under my dress and he told me to pull my skirt up, you know, which I did and that is when he attacked me . . . .
>
> Well, he had intercourse with me . . . .
>
> Well, he put [his private parts] in me. What happened—well, oh, dear, he put it in me (Tr. 18-20).

The witness did not recall where the gun was at this time, but she testified that she was scared (Tr. 20-21). She said that she did not make any noise; that the act took about three minutes, and that when he finished he cleaned himself off, let Mrs. Perry out of the bathroom and had her show him which of the keys opened the front door (Tr. 21-22). He then put the two women in the bathroom and left (Tr. 22). Mrs. Beynum started to cry, Mrs. Perry eventually freed herself. They got out of the bathroom, went next door to a barber shop and called the police, who arrived two to five minutes later (Tr. 22-24).

Mrs. Beynum was taken to D.C. General Hospital, where she was examined.

She said the man had worn a dark jacket, sun glasses, gloves (which he kept on throughout the incident), and arctic boots with a red sole (Tr. 30-31). She did not remember whether he wore a hat, but agreed that he may have worn one (Tr. 66). She said that she thought he

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[3] She estimated that the man was in the back about ten minutes before this occurred (Tr. 64).

was about five feet eight inches tall, and testified that he "was dark and he had some large knots [on his] face, like cysts" (Tr. 66-67).[4]

She testified that she next saw him a week later at a lineup at police headquarters, where she identified him (Tr. 25).[5]

Mrs. Beynum identified appellant in court (Tr. 14). On cross-examination, she said "He was larger than what he is now . . . . He has lost some weight. I know that is him" (Tr. 68).

B. *The Testimony of Mrs. Perry*

Mrs. Perry's testimony paralleled Mrs. Beynum's testimony with respect to what had happened (Tr. 107-120). After Mrs. Beynum was told to sit in the chair in the back room, she was put into the bathroom, from which she was able to hear "just a few words . . . and no other sounds" (Tr. 156). She testified that after the man had put them both in the bathroom and left, Mrs. Beynum turned her back to the wall and started crying (Tr. 117, 157). Mrs. Perry continued:

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[4] During retained defense counsel's cross-examination, the lighting conditions in the store were explored at length. There was a light "just as you walk in the door" and two florescent lights over the counter (Tr. 42-43, 49). There was "one of those lights they use from the ceiling with a light bulb in it" in the back room (Tr. 53). The only light which had been turned off was the first light mentioned (Tr. 52, 7071). Mrs. Beynum did not testify "as to the relatively poor lighting conditions in the premises" (Br. 2). She merely described the lights. Except for when her back was turned, she could see appellant throughout the whole incident (Tr. 71). Mrs. Perry did describe the lighting conditions. She said "[Y]ou could see very well in the cleaners because it was a bright lighted place, even after closing time . . . you could still see from the store [portion], all over the cleaners. It was bright (Tr. 143). Mrs. Perry said that after the man had directed them to the back, they were "sort of under the light", which "hung almost over where we were standing" (Tr. 150).

[5] She testified that she recognized him before that, when he was sitting at a table with someone she thought was a policeman, but who was dressed in plain clothes (Tr. 26, 69).

> She told me he had attacked her during her sobs, crying, you know . . . .
>
> [S]he said that he, I don't know the words she used, but I knew what had happened when she said it, but I don't know the exact words she used (Tr. 118).

She could not recall any time during these events when she saw the man without the gun in his hand. She described him as having a medium build, about five feet seven inches tall, wearing sun glasses, boots which she thought had a red rim around them, a dark, close-fitting jacket which was zipped up, dark pants, and black gloves, which he did not remove as long as she observed him (Tr. 120, 159-161, 167).[6]

Mrs. Perry saw the man again at the lineup held at police headquarters (Tr. 127-29). When asked by the Government if she was sure that she recognized him, she replied, "Yes" (Tr. 129). She said she recognized him because of "his height and his complexion and the contours of his face", and that she also recognized his voice when the four men in the lineup gave their names (Tr. 128, 129-30).[7] Up until then she had not seen appellant

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[6] When defense counsel asked the witness how much time she had to observe appellant in the cleaners, she replied that she "noticed him when [she] came to the front when he was standing at the counter, when [she] walked back to lock the door and on [her] way back, when [she] passed him and when he asked for the key to get out" (Tr. 158-59).

[7] Officer Wolfgang testified that Mrs. Perry made a tentative examination (Tr. 172). He said the lineup consisted of three Negro males 25, 30 and 38 years of age. Appellant was a Negro male 30 years of age. He also testified that "we tried to keep them relatively of the same general appearances". When Mrs. Perry was shown the four individuals, "she stated that number three man, which was Gass, the defendant, looked like the man who had held up the store on February the 3rd". The officer said that was all Mrs. Perry said (Tr. 173-74). He also testified that "[t]here were other lineups conducted prior to this with other suspects where no identifications were made" (Tr. 174). Mrs. Beynum and Mrs. Perry also went through a series of photographs and pictures with "negative results" (Tr. 178). The officer testified that Mrs. Beynum made a positive identification of appellant at the lineup, and that

at headquarters; she did not speak to Mrs. Beynum with respect to appellant before identifying him, and she said she did not have any assistance in identifying him (Tr. 165-67). Like Mrs. Beynum, she said that appellant was heavier then than he was when she identified him in court (Tr. 109-10, 168).

C. *The Testimony of Drs. Kelly and Turla*

Dr. Kelly, offered as an expert witness without objection, examined Mrs. Beynum at D.C. General Hospital on February 3, 1966 about 9:30 p.m. (Tr. 80, 83). Mrs. Beynum was given a general or physical examination and a gynecological examination (Tr. 83-84). The former examination disclosed "no evidence of any trauma or anything that required more examination" (Tr. 83-84). On the basis of the physical examination, it could not be determined whether or not Mrs. Beynum had recently had any sexual relations (Tr. 84). Pursuant to the gynecological examination, smears were taken from Mrs. Beynum's vaginal vault and from her cervix. Dr. Kelly scratched her name and the patient's name on each slide (Tr. 87). The smears were then placed on slides and sent to the laboratory for further examination. Dr. Kelly did a sperm test [5] of the secretions from inside the vagina and found intact sperm (Tr. 85). Dr. Kelly testified that she had marked no other slides with her name and the patient's name (Tr. 91).

Dr. Turla, a pathologist and Acting Director of Laboratories at the hospital, next took the stand (Tr. 92-94). He testified that he conducted the laboratory examination

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when she arrived at the main part of the Robbery Squad office 15 minutes before the lineup was scheduled to begin, she saw appellant "sitting in a chair along side the desk among other people" at a time when "10 or 11 other persons" were in the immediate vicinity. She identified him then. (Tr. 170-71).

[5] The doctor explained that the sperm test "includes taking of some of the secretions and immersing them in saline solution and directly looking at the slide, which I did" (Tr. 85). It was done "subsequent to the staining and the procedure that goes on in the laboratory" (Tr. 89-90).

of slides taken from Mrs. Beynum, at which point defense counsel approached the bench and said it appeared that there was a period of time between Dr. Kelly's taking of the slides and the laboratory examination (Tr. 94). He objected "to the results of Dr. Kelly's examination . . . because there [was] no showing of custody or what had happened to them while they were out of her possession" (Tr. 94-95). The trial judge overruled the objection at that time, suggesting that they wait and see what questions would be asked (Tr. 95).

The witness then identified the slides as the same ones which he had examined by the markings made at the time the specimens were taken of Dr. Kelly's name and the patient's name (Tr. 95). When he began to give the results of his examination, trial counsel unsuccessfully objected on the aforementioned basis, and Dr. Turla was allowed to testify that he found "intact sperm in one of the slides, which was obtained from the cervix" (Tr. 96). The other slide disclosed no intact sperm (Tr. 96). He testified that as soon as the slides were received, they were subjected to processing, and in response to the court's questions of what the procedure was when one doctor makes an examination and makes smears, whether there was an established procedure and what it was, answered:

> The specimen is received, as soon as the specimen is received in the laboratory the specimen itself is check for identification on the patient, the names of the doctors and we enter that in our books. Now, after that, the smears, after that they are stained properly and after that it is examined by the pathologist for sperms (Tr. 97-98).

Counsel were asked by the trial court if either of them had any further questions. Only the prosecutor did. He asked if the marks on the slides were "placed there normally in the ordinary course of hospital business", and the witness said that they were (Tr. 98). When the exhibits were moved into evidence, defense counsel objected on same basis. The objection was overruled and the exhibits admitted (Tr. 99).

II. The Defense

A. *The Testimony of Christine Duncan*

Christine Duncan, who had been going with appellant "a year and something before he got locked up" testified that appellant had come home[9] about 5:55 p.m. on the evening of February 3rd, 1966, "because we were supposed to go to a movie and see 'Thunderbolt'" (Tr. 187-88). She said they had dinner and left for the movie at 7:05 p.m., arriving there about 7:15 p.m. (Tr. 188). According to the witness, "[W]e got out tickets and we went inside the movies and I observed that the man who took the tickets was a man that William knew and he stayed there and talked to him a while and then we went inside and sat down" (Tr. 189-90). They left there "about something to 11:00", stopped a few doors away and got some peanuts, met another gentleman that appellant knew, conversed with him for a while and then started home (Tr. 190). They went to bed "pretty late", because they stayed up and watched television (Tr. 190-91). On cross-examination, she said she knew that this had occurred on February 3rd because it was the day after her grandmother's birthday, which was on Ground Hogs day, and that this was the only way she had of pinpointing the date (Tr. 193). She then said that "This is the only day we had been out since we lived up there" (Tr. 194).

B. *The Testimony of other Defense Witnesses*

Irene Houser also lived at 2556 University Place on the date in question. However, she did not see appellant on that date until 11:30 a.m. She testified that "just about every evening" appellant would bring home ice cream and invite everyone in to share it, and that he did so on "this particular day" (Tr. 197). On cross-examination, she testified that appellant also brought some peanuts (Tr. 201). She testified that she knew it was Thursday because her

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[9] She then lived at 2556 University Place, N.W. (Tr. 188, 196, 200). Appellant had been living there with her about a month (Tr. 194).

roommate "wanted to go and see a stage show that began at the theater and the stage show always began on a Friday, so, this was the day before; and so, it had to be on a Thursday" (Tr. 202-03). When asked if it might have been February the 10th, she said it might have been, and that she was not sure it was the 3rd (Tr. 203).

Michael Mason, who had known appellant since the last part of 1965, testified after being brought over from D.C. Jail that he "happened to run across" appellant at the Lincoln Theatre at approximately 7:35 on the evening of February 3rd (Tr. 105, 204-06). He said he knew it was the 3rd because it was the week of the terrific snow storm and there was supposed to have been a dance contest in Maryland (Tr. 207-08). He didn't participate in the contest—he just knew about it (Tr. 210). Nor did he see appellant when the movie was over, because he left before the picture was completed (Tr. 210).

C. *The* Luck *issue*

After Mason had testified, defense counsel said that he "would like to make a determination as to whether or not [he] would put the defendant on the stand" and asked for a ruling as to whether impeachment of appellant would be allowed (Tr. 211).[10] Counsel said:

> It will be very difficult for me to make a decision to put him on the stand, facing the possibility of the fact of these previous convictions being brought out, possibly, and I would say under the Luck decision that it would be proper for Your Honor to deny the Government the opportunity to bring this in (Tr. 213).

The prosecutor pointed out that this was not the sort of situation in which appellant would be prevented from getting his story before the jury, noting that three witnesses had already given appellant an alibi and citing *Brooke* v.

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[10] Appellant had been charged and convicted in two robberies in 1953, receiving consecutive sentences totalling six to nineteen years. He was released on parole on November 13, 1964 (Tr. 211-12).

United States, *post*, for the proposition that it was reasonable to bring out the prior convictions. The trial judge decided to exclude one robbery and allow impeachment with the other (Tr. 214).

D. *Appellant's testimony*

Appellant's testimony was practically identical to Christine Duncan's testimony. In addition, he said Mr. Mason had been the man with whom he had talked at the theatre; that his weight had remained constant since February 3rd, 1966; and that he had never seen either Mrs. Beynum or Mrs. Perry until they identified him at the lineup (Tr. 218-19). On cross-examination, he testified that the only zippered jacket he owned was light blue; and that he bought ice cream at 14th and Euclid Streets after the movie (Tr. 222-23). During the course of the evening, he talked to Ronald Steward and Paul Gatman (the ticket collector at the movie);[11] saw Mr. Alfred Henderson, Mrs. Mary M. St. John, Miss Harriet Johnson, Mr. Raymond L. Price, Mr. Douglas A. Brown and Mrs. Joseph L. Ducnell (Tr. 223-26). He was then asked if any of the eight persons named were in court that day, which he replied "No" (Tr. 227). Appellant had been reading names from a paper which he had prepared himself (Tr. 227-28). He was impeached on the basis of the robbery conviction (Tr. 227). The defense rested. Defense counsel "move[d] for a directed verdict of acquittal on all grounds" and said nothing more. The motion was denied (Tr. 228).

III. Summations and Instructions

The summation by the prosecutor, to which no objection was entered below, was in pertinent part:

> Before I go into the arguments I wish to make, I will simply point out to you ladies and gentlemen that

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[11] He testified however that the only person who spoke to him or greeted him verbally was Mr. Mason and that he talked to Steward after the movie (Tr. 224, 226). All the other persons named were seen by appellant in the theatre (Tr. 226).

if I say something, that somebody testified in such and such a way, or that such and such was the evidence, what I am telling now is merely my recollection of the evidence, what I say to now is not evidence as such, but if your recollection is in any way different from mine, then, of course, it is your recollection that must govern you when you go back there to the jury room . . . .

[T]here appears to be no contest over the fact that there was indeed a crime committed or several crimes committed that evening. There is no dispute that both of the women were robbed, that Mrs. Beynum, the young lady who testified yesterday was also raped in the large chair that you see in this picture Government Exhibit No. 6, while Mrs. Perry was shut in the closest with her hands tied behind her.

The only issue that you ladies and gentlemen will have to really decide is whether this defendant was in fact the person who committed these crimes.

Let us capitulate a little bit. We know that on the evening in question shortly before 7:00, when Mrs. Perry and Mrs. Beynum were just about ready to close the cleaners, the defendant came in and pulled a gun or had a gun in his hand and told Mrs. Beynum that this was a holdup and he demanded money and that Mrs. Beynum showed him the empty cash register and said they didn't have any money . . . .

We know that both of these women, as you might well expect, were greatly frightened. Both of them told you that. Mrs. Beynum was very much afraid throughout this entire incident, because the gun had frightened her very much.

Mrs. Perry said this morning that at the time she was quite nervous and was very apprehensive and anxious as, indeed, who wouldn't be, with a gun being pointed around in such a manner?

We know, also, that after Mrs. Perry got the money out of the pants pocket, the defendant asked the two women to get money from their purses and so they got, each of them, a dollar, and gave it to him, so he got a dollar from their purses, again, at gun point, ladies and gentlemen.

Mrs. Perry, you will recall, said this morning that during the entire time she never saw the gun out of his hand. He may have put it down for a minute or two, but she didn't know—certainly not for very long.

We know, then, that the defendant tied the hands of Mrs. Perry behind her and put her in the rest-room where she remained for ten to fifteen minutes. During this ten to fifteen minutes, the defendant forced himself upon Mrs. Beynum sitting in the big chair and raped her . . . .

Here, there is no real contest over the fact that Mrs. Beynum was indeed raped and this should not detain you too long; but, I would like to point out to you, if I may, since it is necessary, as part of the proof, I would like to point out the corroborating evidence that we have in this case.

There are two things that have to be corroborated, as you will learn from Her Honor, and the first is the fact of the rape itself, the fact that the woman was raped, and secondly, the identity of the rapist . . . .

[A]s to the identity of the defendant, as the one raped Mrs. Beynum, Mrs. Beynum's identification is corroborated by the testimony, first of all, of Mrs. Perry, who positively identified the defendant here in court, as being the same man who was there on that evening in the cleaners.

So, we have not just one person identifying him, but two, and that makes it a good deal stronger.

In addition, ladies and gentlemen, we have the fact that at a line-up, less than two weeks after the crime occurred, on February the 16th, to be exact; and we got the date from Detective Wolfgang's testimony, that at that line-up, both Mrs. Perry and Mrs. Beynum, independently of each other, identified the defendant as the man who came into the cleaners, the Temple Cleaners, on February the 3rd and had done what he did there.

We have the line-up identification coming a very short time afterwards.

We have, also, the fact there there were several

other line-ups, according to Detective Wolfgang, which yielded negative results . . . .

What matters most, ladies and gentlemen, is that both of them identified him here in this courtroom, yesterday and today.

The defendant . . . has testified and he has put on three other witnesses who have also testified, that he was somewhere else at the time of the robbery and the rape and that he could not have committed it, therefore, but, let us look at the testimony he has presented to you . . . .

[L]et us look at Michael Mason's testimony. He says that he saw the defendant at the movie, the Lincoln Theatre, on that date, because, he says, Thursday, February the 3rd, was when the defendant came to the counter to buy some candy or something, and then later on, once during the course of the movie, he came back in after getting some candy or popcorn; but the only way he can fix the date is, well, there are two ways—first, he says, it was the week of the big storm and, to be sure, there was in all likelihood a snow storm around that time, and we can see from Government's Exhibit No. 1, for example, this picture of the outside of the cleaners, that there is snow on the ground; but, ladies and gentlemen, it is perfectly reasonable to have snow on the ground in February.

It is also reasonable to expect snow to be on the ground in January or December or even March; but just the fact that there was a snow storm, doesn't mean it was February the 3rd.

Mr. Mason also tells us that he remembers there was some sort of contest. That it was a dancing contest scheduled for the following day, which he says was Friday, February the 4th, but we know nothing more about that contest than just what he has told us. He said it was somewhere in Maryland, but we don't know where in Maryland and we've had no testimony, no proof, with respect to that contest as to whether it was in fact scheduled to start or take place on February the 4th or on February the 11th or February the 18th or some other time, even in January.

There has been no testimony at all to fix the date of the dance contest, excepting the rather casual testimony of Mr. Michael Mason . . . .

Ladies and gentlemen, as many of you know, from having sat on other juries as juorors, you are the sole judges of the credibility of the witnesses. In other words, it is up to you, ladies and gentlemen, to decide what witnesses you are going to believe and which witnesses you are not going to believe; and in relation to that, Her Honor will instruct you there are many things that you may take into your determination, such as the way that a witness gives his testimony, whether that witness be the defendant or any of the defense witnesses or the Government's witnesses, or any witnesses at all.

You may consider, for example, the witness' interest in the outcome of the case . . . .

Another factor that you may consider, and which Her Honor will instruct you on also, is the prior criminal record of the defendant.

Now, you will recall the defendant took the stand and testified, during cross-examination, when he was asked if he was the same William Gass who was convicted of a robbery in a certain case, that he stated that he was.

Ladies and gentlemen, it is important to remember the purpose for which this testimony comes to you. The reason that you are told about a prior conviction of any crime by any witness, is so that you may know what kind of a person he is in order to weigh his testimony and evaluate that testimony.

Just because he may have been convicted of robbery before does not mean, or doesn't necessarily mean, that he is in fact guilty of the robbery in this case. The purpose of that evidence is simply for you to consider it as a factor in determining the witness' credibility and Her Honor will instruct you fully on this matter; but this is something that you should bear in mind and probably something that many of you know from having sat as jurors previously.

There is one more point I would like to mention: You will recall that the defendant, when he was testifying, said that he met several friends and acquaint-

ances on the street and in the movie theatre and he gave you their names, in fact. You may recall that he had a piece of paper containing a list of those names; and he went up there on the witness stand and read the list to you. He named eight people, Ronald Steward, Paul Gatman, Alfred Handerson, Mary St. John, Howard Johnson, Raymond Price, Joseph Docnell and Douglas Brown and all of those people, he says, saw and met him on the evening of February the 3rd, 1966.

Ladies and gentlemen, if that is the case, where are those people today? Why aren't they here to back up the defendant's story?

I submit to you that the only reasonable inference you can draw from their absence, the absence of all eight of these people, is that they would not support the story of the defendant, that they would not support his tale about having gone to a movie on that night.

Ladies and gentlemen, I am sure that when you consider and weigh all of the evidence in this case, you will agree that the defendant did not go to a movie on that evening and instead he went to the Temple Cleaners on 7th and F, Northeast, 717 F Street, went into the Temple Cleaners with a gun, held it up, took the money from these two women and raped Mrs. Beynum in that chair.

Now, I ask you, ladies and gentlemen, after you have deliberated upon this evidence, which you have heard in the case, that you return a proper verdict in this case and ladies and gentlemen, a proper verdict in this case is guilty on all three counts of this indictment. Thank you very much. (Tr. 231-45).[12]

On rebuttal, he told the jury that the verdict should be based on Mrs. Beynum's and Mrs. Perry's testimony and the testimony of all the witnesses (Tr. 258).

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[12] During defense counsel's summation, he took the position that "apparently there is no conflict as to whether there was any crime committed"; his basic argument was that appellant didn't do it (Tr. 250, 251-53).

The trial judge instructed the jury *inter alia*:

> You are the judges of the facts; you are the fact-finding body of the Court. You are to decide in this case what the facts are and, in deciding what the facts are, you are to look solely to the evidence in the case.
>
> The evidence in the case consists of the testimony which you have heard from the lips of the witnesses who took the stand here before you and the exhibits in the case. Also you may regard as evidence in this case those inferences, which to your mind reasonably and logically arise from the testimony in the case. . . .
>
> What the lawyers say to you, what they have said to you, is not evidence in the case and that I shall say to you is not evidence in the case, either; and, so, if anything I say or if anything has been said by the attorneys, which according to your recollection is not in conformity with the evidence in the case, then you are to be guided by your own independent recollection and that is because you are, as I have said, the judges of the facts.
>
> You are not only the judges of the facts, but you are also the judges of the credibility of the witnesses who appeared here before you . . . . (Tr. 261.)

Defense counsel had no objections to the instructions (Tr. 275).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2801, provides:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years; Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: Provided further, That if the jury fail to agree as to the punishment the verdict of

guilty shall be received and the punishment shall be imprisonment as provided in this section.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 28, United States Code, Section 1732(a), provides:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business" as used in this section, includes business, profession, occupation, and calling of every kind.

SUMMARY OF ARGUMENT

I.

The trial judge properly admitted into evidence two slides of smears taken from the rape victim by the examining doctor and sent to the hospital laboratory, either under

extra-statutory principles of evidence or under the Federal Business Records Act, 28 U.S.C. § 1732(a). As to the former, the determination of whether a proper foundation has been laid is a matter within the trial judge's discretion, and that determination will not be overturned absent an abuse of discretion. The circumstances, including the nature of the slides, the surroundings, and the nature of the persons handling them were such that the trial judge could properly conclude that in reasonable probability, the articles had not been changed in important respects. Under such circumstances, no abuse of discretion occurred.

There was also sufficient testimony to qualify the slides here involved under the above statute, given the circumstances.

Whether or not the slides were properly admitted, only harmless error accrued. The defense was essentially one of alibi, and trial counsel below focused on that during trial and summation without seriously contending whether the rape had been committed. Moreover, two robberies were also charged, and the admission of the slides was not connected to them.

II.

Reversible error did not occur when the trial judge allowed impeachment of appellant by one of two 1953 robbery convictions during this trial for rape and robbery. Counsel did not properly invoke the trial judge's discretion and so cannot claim that it was abused here. In any event, appellant's alibi witnesses had already put his story before the jury in a trial in which credibility was of central significance. Under the circumstances, a ruling adverse to the Government would have artifically inflated the evidentiary value of the defense testimony. As it was, the prosecutor was allowed to use only one of the robbery convictions. And while the robbery conviction used occurred in 1953, counsel below did not raise any issue of remoteness, nor could it be said that appellant had led a

legally blameless life in the interval since he was incarcerated until late 1964. Under the circumstances, there was no abuse of discretion.

III.

Having failed to object below, appellant cannot raise for the first time here his claim that errors lurked in the prosecutor's summation. Even if he could, no error occured, but if it did, it was harmless error. The prosecutor could comment on appellant's failure to produce eight persons he named as having seen him at or on the way to a movie during the time of the rape-robbery since they were peculiarly within appellant's power to produce and they could elucidate the transaction in question. Even if that were not the case, the prosecutor and the trial judge directed the jury to base their verdict solely on the evidence as presented during the trial, and the matter was not given elevated status or even mentioned in the instructions. Moreover, the evidence against appellant was cohesive and fairly strong. Both complainants had ample opportunity to observe him under good lighting conditions and separately identified him at trial and after an undetermined number of lineups which yielded negative results. Appellant's alibi witnesses were unimpressive. In this light, error, if any, was harmless as to this statement and others in the summations.

IV.

The evidence supported the verdict. Appellant claimed he wasn't there. The complainants claimed he was. An issue of credibility was raised, the resolution of which was for the jury. They properly resolved it against appellant.

ARGUMENT

I. The trial did not err in admitting into evidence two slides of smears taken from the rape victim by the examining doctor and sent to the hospital's laboratory. Error, if any, did not substantially prejudice appellant.

(Tr. 85, 87, 89, 91, 95)

Appellant here argues that the failure of the Government to show custody and control of slides taken from Mrs. Beynum by the doctor who examined her and sent to the hospital laboratory for pathological examination gave rise to reversible error. We disagree.

Whether or not the Federal Business Records Act, 28 U.S.C. § 1732(a) applied to this situation, the slides were properly admitted. The determination of whether a proper foundation has been established for the admission of real evidence rests within the discretion of the trial judge, whose determination as to the nature and identity of the items may not be overturned except for a clear abuse of discretion. *Reed* v. *United States*, 377 F.2d 891 (10th Cir. 1967); *West* v. *United States*, 359 F.2d 50, 55 (8th Cir. 1966); *Brewer* v. *United States*, 353 F.2d 260 (8th Cir. 1955); *Gallego* v. *United States*, 276 F.2d 914 (9th Cir. 1960). That discretion has not been abused here. The nature of a slide is not such as to render it likely that it be spoiled by some unsuspecting person, especially the nurse to whom it was given (Tr. 89). The circumstances surrounding its custody, especially the fact that it was in a hospital, and at most unaccounted for while in transit between the examining doctor and the pathological laboratory of that same hospital, gives rise to no indication of foul play. There was no evidence that anyone had any inclination to tamper with the slides or their contents. The record indicated that the examining doctor carefully marked both the slides at the time the smears were taken with her name and Mrs. Beynum's name, and the chances of there being other slides with the same combination of

names were statistically minimal indeed.[13] The court need not have been convinced that all possibilities of tampering were excluded, but only that in reasonable probability the article had not been changed in important respects. *Barquera* v. *California*, 374 F.2d 177 (9th Cir. 1967); *West*, *supra*, at 55; *United States* v. *Penick*, 136 F.2d 413 (2d Cir. 1943). Under the circumstances, the trial court did not abuse her discretion by admitting the slides into evidence. *Cf. Adams* v. *United States*, 134 A.2d 645, 648-49 (D.C. Ct. App. 1957) (testimony of inspector for Food and Drug Administration who received sealed envelope containing drugs and took it from Washington to Baltimore to be delivered there not essential since he was only a courier); see also *Pasadena Research Laboratories* v. *United States*, 169 F.2d 375 (9th Cir.), *cert. denied*, 335 U.S. 853 (1948) (semble).[14]

The slides were also properly admissible under the Federal Shopbook Act. *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 211 F.2d 19 (1953), *cert. denied*, 347 U.S. 1019 (1954).[15] There, as here, the principal medical witnesses were an examining doctor and a laboratory supervisor. There, as here, was testimony that the name of the victim had been scratched on the slide and transmitted to the laboratory, but the examining doctor could not say with certainty that the slides were the same except for the name marked thereon. The laboratory supervisor

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[13] She marked no other slides with those two names (Tr. 91).

[14] The Court there spoke of a presumption that private individuals do their duty and exercise due care, citing *Bank of the United States* v. *Dandridge*, 25 U.S. 64 (1827) and *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291 (1930) and noted that it "should apply *a fortiori* to doctors and nurses whose professional training and traditions teaches them to be meticulous", *Pasedena Research Laboratories*, *supra* at 382.

[15] The Court distinguished *Novak* v. *United States*, 82 U.S. App. D.C. 95, 160 F.2d 588 (1947) saying that the samples there were not taken in the regular course of business of the laboratory involved, but rather they were taken by an *outside agency*, the police, and *only thereafter delivered to the laboratory*. *Id.* at 164, 211 F.2d at 23 [emphasis added].

there said that the slides "had been received from the hospital admitting office in accordance with established procedures"; here, the testimony in this respect is not so clear-cut, but we submit it amply demonstrated that the trial court could reasonably have concluded that the procedures followed in this case were those regularly used to make and keep records of examinations of this kind. Dr. Kelly testified she took the smears and sent them by a nurse to the hospital's laboratory, there to be treated and stored (Tr. 85, 87, 89, 91). Before she did so, she scratched her name and Mrs. Beynum's name on the slides with a tool used for that purpose (Tr. 87). Dr. Turla, the pathologist, testified that the slides marked as government exhibits were those that he had received, and that he identified them by the names thereon (Tr. 95). He then testified that as soon as they were received, they were stained and processed, and in answer to the trial court's query as to established procedures, answered that as soon as the specimen is received in the laboratory it is checked for identification by using the patient's name and the doctor's name, which names were entered in their books, and that the marks placed on the slides were placed there normally in the ordinary course of hospital business (Tr. 97-98). On this testimony, given the hospital setting, the nature of the personnel involved, and the fact that the test was not a complicated or unusual one,[16] the trial judge properly concluded that the slides were routine reflections of day-to-day hospital activities and that the requirements of the statute were met. As the basic reason—trustworthi-

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[16] *Cf. Thomas* v. *Hogan*, 308 F.2d 355, 360 (4th Cir. 1962) in which the Court stated that "a record entry of a commonly performed blood test would be admissible, while an entry of the result of a scientific test infrequently done might not". That Court also noted:

> There is good reason to treat a hospital record entry as trustworthy. (Footnote omitted). Human life will often depend on the accuracy of the entry, and it is reasonable to assume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least hospital records are deserving of presumption of accuracy even more than other types of business entries. *Id.* at 361.

ness—for carving out an exception to the hearsay rule has not been shown nor appears to be lacking here, this Court should be loathe to overturn the trial judge's determination [17] that the evidence was admissible below.

Assuming *arguendo* that the trial judge erred in allowing these items to be admitted, the Government submits that only harmless error accrued. The essence of the defense was not that Mrs Beynum had not been raped, but that appellant was not the perpetrator of the deed. The entire defense was premised on appellant's presence elsewhere at the time of the offense, and that was the thrust of the summation as well. Moreover, to say that admission of these slides prejudiced appellant is to overlook the fact that two robberies were also charged, to which acts the slides were unconnected. The slides did not, in any event, supply a required element of the rape offense. Mrs. Beynum's testimony amply established penetration, and the testimony of Mrs. Perry corroborated the circumstances surrounding the parties at the time, which was all that was necessary.[18] The medical evidence did not bear on the question of who raped Mrs. Beynum, but merely established that semen was present in her vagina. A jury so attuned to the issue of identification, by virtue of the way the testimony unfolded at trial, would hardly lean towards a conviction based on the medical testimony.

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[17] In this connection we think it proper to note that the Supreme Court has said that the determination of admissibility should be made "according to the character of the records and the earmarks of their reliability . . . acquired from the source and origin and the nature of their compilation". *Palmer* v. *Hoffman*, 318 U.S. 109, 114 (1943). Moreover, objections to either doctor's lack of personal knowledge of the steps from preparation of the slides to their production in court affect weight, not admissibility. *Wheeler*, *supra* at 164, 211 F.2d at 23.

[18] See *e.g.*, *Kelly* v. *United States*, 90 U.S. App. D.C. 125, 191 F.2d 150 (1952).

II. The trial judge did not abuse his discretion in allowing impeachment of appellant by one of two robberies he committed in 1953.

(Tr. 211-213, 244, 263)

Appellant asserts that impeachment should not have been allowed because of remoteness and because appellant was on trial for the same offense as the prior conviction. Laying aside for the moment the problem of whether the trial judge's discretion was properly invoked,[19] we submit that this contention is without merit.

Under 14 D.C. Code § 305, "convictions for crime retain statorily some degree of relevance to trustworthiness which *Luck* v. *United States*,[20] does not automatically dispel". *Brooke* v. *United States*, D.C. Cir. 20,241, decided April 19, 1967 (slip opinion p. 12). *Luck* established only that Congress in promulgating the aforementioned statute left room for the "play of judicial discretion over the unfolding circumstances of the immediate trial", which highly discretionary adjudication will not be disturbed on appeal "unless the wisdom of doing so is very clear." *Brooke*, *supra* at 12-13.

Here, appellant chose to take the stand although two defense witnesses had already established his alibi defense and the testimony of a third witness, Irene Houser, strongly tended to corroborate it. The Government's case of course indicated that appellant was the robber-rapist. In these circumstances, not only was credibility of central significance, but a ruling adverse to the Government would have artificially weighed the evidentiary value of the defense testimony in the eyes of the jury. *Id.* at 12; *Gordon* v. *United States*, D.C. Cir. No. 20,126, decided September 18, 1967 (slip opinion at 8). "[W]ith credibility so vital, the cause of truth was not likely to be advanced by permitting appellant to testify to events already delineated to the jury if facts germane to the reliability of that testimony were suppressed". *Brooke*, *supra* at 12.

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[19] See page 25 and footnote 21, *post*.

[20] 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

Nor does more extended inquiry reveal persuasive reasons why the trial judge's actions below should be overturned. While the special problem of the similarity of the previous convictions to the robbery here existed, impeachment was limited to only one of the two previous robbery convictions. See *Gordon, supra* at 6. As argued above, the credibility issue directly raised here, coupled with the fact that appellant had already put his story before the jury, gave rise to valid reasons for disclosure. Defense counsel's proffer below was not that if appellant was impeached he would forego taking the stand, but rather to the effect that it would be difficult for him to make a decision to do so if the convictions were put before the jury (Tr. 211, 212, 213).[21] No details were presented as to how the convictions would prejudice appellant, the nature of his forthcoming testimony, or how it would relate to that of other defense witnesses, or the need to have appellant testify, nor was the issue of remoteness broached.[22] The conviction used was not one merely indicative of a violent or assaultive nature, but rather one which reflected adversely on appellant's integrity and honesty. *Id.* at 5; *Edwards* v. *United States*, 78 U.S. App. D.C. 226, 229, 139 F.2d 365, 368, *cert. denied*, 321 U.S. 769 (1943) (robbery defined as aggravated form of larceny).

Under these circumstances, it cannot be said that the trial judge abused her discretion.[23]

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[21] *Cf. Hood* v. *United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966) (if no meaningful invocation of judicial discretion by defendant Court of Appeals without warrant in the record for upsetting trial judge's determination). See also *Lewis* v. *United States*, D.C. Cir. 20,083, decided February 13, 1968 (6 robberies in 1953, robbery at issue on trial, discretion not properly invoked); *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F.2d 681 (1966) (no invocation); but *cf. Lewis* v. *United States*, —— U.S. App. D.C. ——, 381 F.2d 894 (1967).

[22] Appellant argues remoteness here, but we think these particular facts relegate the issue to the realm of relative insignificance. Where, as here, appellant was incarcerated until late 1964, that he led a "legally blameless life" can hardly be said to bear on his credibility. *Cf. Gordon, supra* at 6.

[23] Appellant argues that the prosecutor stressed appellant's prior conviction during summation. That he did was not surprising. The

III. Statements made by the prosecutor in his closing argument did not give rise to reversible error.

(Tr. 231-33, 242, 248, 258, 261-62)

Appellant asserts for the first time here that prejudicial error necessitating reversal occurred in the prosecutor's argument to the jury. Defense counsel below, who showed himself to be a persuasive and effective advocate during the entire course of the trial, did not object to any of the government's summation. Nor did he request a remedial charge. But "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that comments to the jury were improper and prejudicial". *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940). Accordingly, appellate courts ordinarily refuse to entertain challenges to the propriety of a summation raised for the first time on appeal. *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961); see also *Accardo* v. *United States*, 102 U.S. App. D.C. 4, 249 F.2d 519 (1957). As appellant's counsel was not alarmed by the nature of the Government's summation below, we think appellant ought not be heard to complain here.

Assuming *arguendo* that appellant can properly raise this issue at this late date, we submit that no error inhered in the government's summation.

Appellant asserts *inter alia* that the prosecutor erred in saying that the only reasonable inference that the jury could draw from the absence of Ronald Stewart who appellant claimed to have seen on the way to the movie; Paul Gatman, the ticket collector at the movie, and six other named individuals who appellant claimed to have seen at the movie, was that they would not support his tale about

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issue was one of credibility—defense counsel's argument in essence was not that the crimes had not been committed, but that appellant, as asserted by his alibi witnesses and himself, wasn't there. And, appellant neglects to mention that the prosecutor pointed out, as did the trial judge, that the conviction related only to credibility (Tr. 244, 263).

having gone to the movie on that night. Such an inference against appellant is permissible if the witnesses alluded to are "peculiarly within his power to produce" and if their "testimony would elucidate the transaction". *Wynn* v. *United States*, D.C. Cir. No. 20,723, decided November 16, 1967. Here, the record demonstrated that the persons in question were appellant's alibi witnesses, and that they could verify his presence at the movies at the time in question. As it developed here, the existence and identity of those persons remained undisclosed until late in the trial. Availability, we submit, is not merely a matter of accessibility to service of process but a determination of other factors such as one party's superior knowledge of their existence and identity. *Cf. United States* v. *Jackson*, 257 F. 2d 41 (3rd Cir. 1958); *McClanahan* v. *United States*, 230 F.2d 919 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956); Wigmore, *Evidence* § 288 (3d ed. 1964 Supp.) at 73. Under the circumstances, especially given appellant's already prepared list of names we submit that these named witnesses were "peculiarly available to" appellant and that by their very nature as alibi witnesses, they could have "elucidated the transaction" with respect to appellant's whereabouts at the time in question. Certainly appellant seemed to think so. The requisite tests being met, we submit the prosecutor could comment on the failure of these persons to appear in support of appellant. *Cf. Pennewell* v. *United States*, 122 U.S. App. D.C. 332, 353 F.2d 870 (1965) (rule inapplicable where witness' interest obviously hostile to appellant's).

In any event, the prosecutor's comment did not substantially prejudice appellant, a prerequisite to reversal. *Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965). In rebuttal, the prosecutor reminded the jury to base their verdict on the trial testimony of Mrs. Beynum and Mrs. Perry and all of the witnesses (Tr. 258). His comments were immediately preceded by a discussion of factors bearing on appellant's credibility, as to which he reminded them that they were the sole judges (Tr. 242). The trial judge forcefully reminded the jury that they

were "to decide in this case what the facts are and, in deciding what the facts are, you look solely to the evidence in the case", which evidence consisted of the "testimony . . . from the lips of the witnesses who took the stand here before you and the exhibits in this case" (Tr. 261). She made it clear that "what the lawyers say to you, what they have said to you, is not evidence in this case", and that the function of determining credibility was theirs (Tr. 261-62). The matter which appellant claims amounted to error was not given elevated status by or even mentioned in the trial judge's instructions. The basic fact—that appellant had not produced these named witnesses—was already obvious to the jury.

Both Mrs. Perry and Mrs. Beynum gave clear descriptions of appellant; both had ample opportunity to observe him at close range under good lighting conditions. Mrs. Beynum positively identified appellant, and Mrs. Perry "tentatively" identified him—that is, she said he looked like the man in the cleaners, because of his height, complexion and the contours of his face. Moreover, the latter identified him by voice, and both witnesses identified him separately, after viewing other lineups.[24]

On the other hand, appellant's witnesses left much to be desired. His chief witness was his girlfriend, who could connect the events of that date only to her grandmother's birthday and the claim that that was the first time they had been out together. Another witness "just happened to run across" appellant that night at the movies, after having known him since "the last part of 1965" (Tr. 204). This same witness was transported from the jail to testify, and could only relate February 3rd to a dance contest which was supposed to have been held in Maryland and that snow was on the ground (Tr. 207-08). Appellant's third witness could not even testify that she saw appellant at or about the time the criminal acts took place, and was not sure whether this was on February 3rd or February 10th.

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[24] In this connection it is important that appellant's facial characteristics were fairly unique.

This was not a "paper-thin" case. In fact, the evidence, if the jury accepted the victims' testimony, was fairly strong against appellant. Taking these factors into consideration, we submit that these statements do not warrant reversal. *Cross* v. *United States*, *supra* at 283, 353 F.2d at 454.[25]

Other asserted errors in summation are alluded to for the first time here and it is claimed that accordingly, the argument "[t]aken as a whole" unduly prejudiced appellant. It is said that the prosecutor mischaracterized the testimony of the police officer, but to controvert this proposition we need only refer appellant to page 174 of the transcript and remind him that counsel are given wide latitude in their closing arguments, even over objection, if the statement has some basis in the record.[26] *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438, *cert. denied*, 341 U.S. 905 (1951). It is said that the prosecutor unduly stressed appellant's criminal record, but as we have argued elsewhere, that did not amount to error.[27]

More troublesome is his claim that the prosecutor told them that "he knew" appellant had entered the premises with a gun.[28] But the record, taking the statement in context, falls short of establishing that he was testifying as to his own personal knowledge that this had occurred. Rather, he was arguing to the jury that the combination of Mrs. Perry's and Mrs. Beynum's testimony had so established, for his comments were preceded by the admonition to the jury that what he was telling them was merely his recollection of the evidence, which was not controlling (Tr. 231-32). And if his actual words "we know" were to be taken literally, it would make little sense to argue,

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[25] Nor do we understand appellant's position to be that the "missing witness" comment alone necessitated reversal (Tr. 13).

[26] Compare defense counsel's statement to the effect that the witnesses disagreed as to whether appellant had worn a hat (Tr. 248).

[27] See Argument II, pages 24-25.

[28] The actual words were "we know" (Tr. 233).

as he did later, that appellant's witnesses lacked credibility. Even if appellant could magnify this comment into plain error,[29] we think the considerations above with respect to lack of substantial prejudice equally apply here.

IV. The evidence supported the jury's verdict.

Appellant argues that the jury's verdict was contrary to the weight of the evidence insofar as the identification of appellant was concerned. He admits that the government may have established a *prima facie* case, but asserts that "the clear and convincing alibi testimony" entitled appellants to a judgment of acquittal after it had been given. This proposition does not merit extended comment. Of the three alibi witnesses, one was appellant's girlfriend, one was in jail at the time of trial, and the other did not see him until long after the time of the alleged offense. Appellant's own credibility was impeached. The jury might have believed them. They might not have, in the light of the testimony of the two victims, viewed in the light most favorable to the Government. The question was one of credibility. It is quite clear that it cannot be said that there was "no evidence upon which a reasonable mind might conclude guilt beyond a reasonable doubt" and that the resolution of the conflict was for the jury. See, *e.g. Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

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[29] Certainly, this comment was less serious than that appearing in *Gibson* v. *United States*, D.C. Cir. No. 20,885, decided February 12, 1968 (slip opinion 2 n.1), which this Court said did not warrant reversal. See also *(Sammie B.) Lewis* v. *United States*, D.C. Cir. 21,083 decided February 3, 1968; *McFarland* v. *United States*, 80 U.S. App. D.C. 196, 197, 150 F.2d 593, 594 (1945), *cert. denied*, 326 U.S. 788 (1946). Nor was this a situation in which the prosecutor argued facts to the jury which he had been unable to get into evidence over a defense objection. *Garris* v. *United States*, D.C. Cir. No. 21,142, decided February 14, 1968.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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